No 29.

make any voluntary or gratuitous assignation in prejudice of that provision in the bond, as was decided the Helen Home against the Lord Rentoun, Sec. 6. *h. t.*, where the Lords found, that a clause providing the sum to return to the Lord Rentoun, failing of his sister and her heirs, behoved to be effectual to the Lord Rentoun against gratuitous and voluntary deeds; and the —— day of February 1679, Drummond against Drummond, No 26. p. 4338.; and the reason is because such a provision in the bond is not properly a naked substitution, but a qualified fee affected with that provision, by which the granter of the bond is constituted a creditor in that event; so that the party to whom the same is granted, cannot do any gratuitous or voluntary deed, to evacuate the same. *Answered*, That the said Mary Scott the cedent being fiar of the same, she may dispose of it as she pleased, either by way of gratuity, or for an onerous cause; and the foresaid clause can import no more but a substitution and destination of succession in favours of the granter of the bond; and as she might have uplifted the sum and lent it out to other persons, notwithstanding of the foresaid provision, by that same reason she may dispose of it as she pleases; and this being a substitution, the pursuer could not come to the right of the bond but by succession, seeing that clause could not transmit the fee of the sum without a formal right; and if the pursuer have right to the sum by succession, then he must represent the defunct, and consequently be obliged to warrant the defender's assignation. THE LORDS sustained the reason of reduction, and found, that the defunct could make any gratuitous voluntary assignation in prejudice of Mangerton, granter of the bond, and therefore reduced the assignation.

Fol. Dic. v. 1. *p.* 308. *Sir Pat. Home, MS. v.* 1. *No* 505.

1685. *February* 11.

COLLEGE of EDINBURGH *against* MORTIMER, SCOT and WILSON.

No 30.
A bond for borrowed money was taken to the lender in liferent and her son in fee, with a provision, that in case the son should die without heirs of his body, the sum should return to the lender and her heirs. Found that the son could not assign gratuitously.

——, Relict of Bailie Calderwood, having taken a bond for 2000 merks from one Scot, bearing the receipt of the money from herself, and payable to her in liferent, and to her son Mr Thomas in fee; with a provision, that in case he deceased without children, the sum should return to her and her heirs; the son mortified the money to the College of Edinburgh, and died without children.

In a competition which arose betwixt the College and the Mother, it was *alleged* for the College, That the mother was but heir-substitute in fee to her son, and could not quarrel his deed.

Answered; The mother who lent the money, might qualify the fee as she pleased; and the quality being inserted by way of provision, and not by the words 'which failing,' the son could not dispose of the same *lucrative*, whatever might be pleaded that he could do for an onerous cause.

'THE LORDS found, that the son had but a qualified fee, and could not mortify the money in prejudice of the provision in favours of his mother.' It was here alleged, but not proven, that the fee of the money had been formerly se-

cured to the son, without any quality, and that the mother had renewed the bond with it. No 30.

Fol. Dic. v. 1. *p.* 307. *Harcarse,* (BONDS.) *No* 200. *p.* 45.

*** P. Falconer reports the same case:

THERE being a bond granted by Scot of Langhame of 2000 merks, bearing the receipt of money from ——— Mortimer, relict of Bailie Calderwood, and payable to the said Mortimer, for her liferent use, and to ——— Calderwood her son in fee, with this provision: 'That in case the son should die without heirs of his body, the sum should return to ——— Mortimer his mother, and her heirs;' the son before his decease, upon death-bed, assigns to the College of Edinburgh the said sum, and he died without heirs of his body. The College having pursued the debtor for payment of this sum contained in the bond; there is compearance for one Wilson executrix to the said Mortimer the mother; and *alleged*, That she ought to be preferred, in regard, by the tenor of the bond it appeared, that the money was received from her mother, and albeit her brother was fiar, yet the fee was qualified with the foresaid provision, That failing of heirs of his body, the sum should return to his mother; which provision, he could not evacuate by the foresaid mortification, which was a voluntary deed without an onerous cause. THE LORDS having examined witnesses *ex officio*, if the money was originally the son's, and not the mother's; and that not being proven by the depositions of the witnessess, but the contrary, That the money belonged to the mother, they found, that the foresaid provision was not of the nature of a simple substitution, but was of the nature of a provision or condition, and so could not be frustrated by any voluntary deed, without an onerous or necessary cause, and therefore preferred the Executors of the mother to the College. *P. Falconer, No* 97. *p.* 67.

1717. *February* 18. DUKE of DOUGLAS *against* LOCKHART of Lee.

PART of the family estate of Douglas being given away 'to the heir of a second marriage, and the heirs of his body; which failing, to return to the 'right heir of the family of Douglas,' it was found, that this estate could not be gratuitously alienated in prejudice of the clause of return, it being argued, That here the proprietor was giving away an estate from his successors for a special use, in which this reasonable condition is implied, that when the use is at an end, himself or his heirs should have back the estate. *See* APPENDIX. *Fol. Dic. v.* 1. *p.* 308. No 31.

1726. *January* 26. MARQUIS of CLIDESDALE *against* EARL of DUNDONALD. No 32.

A proprietor having settled his estate upon his son and heir, and the heirsmale of his body; whom failing, to return to himself; this was found to be a